

Efficient Medical Transport, Inc., Phoenix Transportation Services, Inc., and MedTrans and Teamsters Local 331, a/w International Brotherhood of Teamsters, AFL-CIO. Case 4-CA-25177

September 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 9, 1997, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In joining their colleague to adopt the judge's dismissal of the complaint, Chairman Gould and Member Fox agree that the General Counsel failed to establish that union activity was a motivating factor in the Respondent's discharge of employee Michael Hewitt. They emphasize that low-level Supervisor David Neiderhofer was the only management person shown to have knowledge of Hewitt's union activities, and although complaints that Neiderhofer had made or reported about Hewitt's work performance were significant bases for the discharge decision, it is undisputed that Neiderhofer was, along with Hewitt, a promoter of the Union. Compare *JMC Transport v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985) (imputing antiunion supervisor's knowledge and animus to executive who made discharge decision); and *Allegheny Pepsi-Cola Bottling Co.*, 134 NLRB 388, 401-402 (1961), enf'd. 312 F.2d 529, 531 (3d Cir. 1962) (same).

Donna Brown, Esq., for the General Counsel.

Joseph Piazza, Esq., of Pennsauken, New Jersey, for the Respondent.

David L. Tucker, of Pleasantville, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 3-4, 1997.

The charge was filed August 8, 1996,¹ and the complaint was issued December 31, 1996.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Prior to October 1, Efficient Medical Transport, Inc. (EMT or Efficient), a corporation with headquarters in Pennsauken, New Jersey, provided medical transportation (e.g., ambulance) services. Phoenix Transportation Services, Inc. was a payroll services Company for EMT, which may have nominally been the Employer of Efficient's employees. On or about October 1, MedTrans purchased the business of Efficient and since then has operated Efficient's business in a basically unchanged form.² In 1996, Efficient derived gross revenues in excess of \$1 million and received revenues in excess of \$50,000 directly from points located outside the State of New Jersey. Phoenix derived revenues in excess of \$50,000 from EMT. I find that Efficient and Phoenix were a single employer who engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that MedTrans is their successor employer. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.³

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that the Respondent discharged Michael Hewitt on July 24, 1996, in violation of Section 8(a)(1) and (3) because he supported and assisted the Union. For the reasons stated below, I conclude that the General Counsel had failed to make a prima facie case of discrimination.

A. Michael Hewitt's Employment with Efficient Medical Transport

Michael Hewitt worked as an emergency medical technician for Efficient Medical Transport from February 1995 until July 24, 1996, when he was fired. His duties were to drive an ambulance to transport patients from one medical facility to another and to resuscitate patients when necessary. Prior to his discharge Hewitt had not received any warnings, suspensions, or any other kind of discipline. Several weeks prior to his discharge Hewitt had signed a union authorization card and participated in an organizing campaign.

¹ All dates are in 1996 unless otherwise indicated.

² MedTrans is apparently a subdivision of Laidlaw Medical Transportation, Inc. (Jt. Exh. 2 and Tr. 23).

³ The Respondent has raised no substantial argument to support its contention that MedTrans is not a successor employer to EMT/Phoenix, or that Efficient and Phoenix were not a single employer for purposes of the Act. After the purchase of EMT, MedTrans provided the same services with the same employees reporting to the same supervisors. There was virtually no change in the operation of the business after October 1. Likewise, Phoenix and Efficient had the same supervisors. Phoenix appears to have been no more than the payroll accounting department of Efficient.

B. *The Union's Organizing Campaigns*

Teamsters Local 331 attempted to organize the Respondent's employees in 1995. The Union lost an NLRB election that summer. In the summer of 1996, the Union's business agent and organizer, Thomas Willett, ran into employee Lynne Dentino at a grocery store. Dentino told Willett that there was renewed interest amongst the Respondent's employees in the Union. Dentino and Willett arranged for Willett to meet with some employees to start another organizing drive.⁴

When Willett arrived at the meeting site there were somewhere between 13 and 15 employees present. Among them were Michael Hewitt and his partner, Jennifer Brady, and Dentino and her partner, David Neiderhofer. In addition to driving an ambulance, Neiderhofer was the Respondent's supervisor for Atlantic county, New Jersey.

When introduced to Neiderhofer, Willett told him he would have to stand apart from the other employees because he was a member of management. Neiderhofer did so. At the end of the meeting a number of employees signed cards authorizing the Union to represent them, including Neiderhofer and Hewitt. A number of these employees solicited other employees to sign authorization cards. There was a second meeting with Willett soon after the first and then the organizing drive ended. The General Counsel contends that Hewitt was conspicuous in the 1996 organizing drive. I conclude that the preponderance of the evidence does not support this contention. Even if Hewitt was conspicuously active in the campaign there is no evidence that the Respondent was aware of this fact or bore animus towards his union activities.

C. *Resolving the Conflicting Evidence Regarding Michael Hewitt's Role in the Organizing Drive*

Hewitt testified that at a meeting with Willett, the union representative asked for volunteers to distribute authorization cards. Only three employees volunteered, Hewitt, Dentino, and Daniel Zane. Hewitt also testified that he took some authorization cards and with the assistance of his partner, Jennifer Brady, solicited a number of employees.

Brady was fired by the Respondent on November 9, 1996. She was subpoenaed to testify by the Respondent. Brady stated that everybody was soliciting other employees to sign authorization cards and that Hewitt had no special role in the organizing campaign. According to Brady, the only employee who stood out in the organizing campaign was Lynne Dentino.

Dentino also testified that there was nothing significant in Hewitt's role in the organizing campaign. She stated that at a second meeting between Willett and the Respondent's employees, Willett asked for volunteer organizers. Dentino testified that nobody volunteered.

Willett testified that at the first meeting Hewitt immediately approached him and expressed his concerns and his support for the Union. He stated that on several occasions during the meeting Hewitt came to him to explain things.

⁴The record is not clear as to the dates when the Respondent's employees met with Willett. Hewitt testified that the second meeting between employees and Willett occurred on July 6. I conclude that the meetings and organizing drive occurred sometime in early to mid-July.

Willett described Hewitt as being the most knowledgeable employee and the one who "showed the most direction and interest." Willett also characterized Hewitt as his main contact in the organizing drive. After the meetings Hewitt called Willett on several occasions and visited his office twice.

I credit the testimony of Brady and Dentino and find that other employees, including Neiderhofer, were not aware of any special role that Hewitt had in the organizing campaign. So far as this records shows, I conclude that Neiderhofer was aware that Hewitt supported the Union to the same extent as a number of other employees. There is no evidence that the Respondent was aware of Hewitt's union activity other than through Neiderhofer.

The General Counsel attempted to attack Brady's credibility. Hewitt testified that he never made certain statements, which reflected adversely on his reputation for veracity, to Brady. However, it was Dentino, rather than Brady, who testified about these statements. Hewitt's wife speculated that Brady might harbor some animus toward her husband because Brady had at one time been romantically interested in him. I find Brady's testimony completely credible. Even if she harbored animus toward Hewitt, it was likely more than offset by animus toward the Respondent for terminating her employment. Moreover, her testimony is corroborated by Dentino and uncontradicted by anyone other than Hewitt. Finally, when Hewitt was asked who could corroborate his testimony about his union activities, he mentioned Brady and nobody else (Tr. 89-93).

D. *The Evidence Regarding Animus Toward Michael Hewitt's Union Activity*

Michael Hewitt testified that shortly after a third meeting with Willett, David Neiderhofer told him that "I think we ought to back off the union now. We're going to have casino contracts. We're not going to need it anymore[.]" (Tr. 94).⁵ Hewitt stated this was not said in a threatening manner and came up in the course of passing conversation. Hewitt did not respond to the remark. Neiderhofer denies making the remark. I am unable to conclude that Neiderhofer made the remark attributed to him. Hewitt's testimony is not corroborated and there is no other evidence of hostility or even opposition by Neiderhofer to the organizing campaign. There is no reason for Neiderhofer to express his opposition to a continuation of the campaign only to Hewitt, if he was interested in sabotaging it.

Hewitt's wife, Tara, testified that the day after Michael Hewitt was fired, David Neiderhofer met with employees and told them that they did not need the Union anymore because the Respondent had entered into contracts with several casinos. I do not credit this testimony because of the lack of corroboration and T. Hewitt's obvious interest in the outcome of this proceeding. She was fired by the Respondent a week after her husband and has a lawsuit pending against the Company.⁶

⁵Dentino, Neiderhofer, and Willett testified that there were only two meetings. Brady could only recall one.

⁶Tara Hewitt was fired for insubordination after a telephone conversation with John Eagle. The conversation concerned letters solicited by the Respondent from all or most of its employees in Atlantic county. These letters stated that the employees did not wish to work with T. Hewitt.

The only other evidence of animus is Hewitt's testimony that immediately after this conversation, Neiderhofer began to closely scrutinize his work performance. While the record demonstrates that Neiderhofer paid close attention to Hewitt's performance in the week prior to his termination, there is no credible evidence linking this development to Hewitt's union activity.

E. The Reasons Given by the Respondent for Terminating Michael Hewitt

On Friday, July 19, Hewitt and his partner, Jennifer Brady, took an ambulance out of service because they believed, apparently mistakenly, that one wheel was secured by only two lugnuts. David Neiderhofer testified that although only two lugnuts were visible, the wheel was actually secured by several other lugnuts located behind the hubcap. According to Neiderhofer, Hewitt drove his ambulance back to the Respondent's dispatch point after making a service call with a replacement ambulance.

Neiderhofer believes that Hewitt could have driven his ambulance back to his base before the service call, rather than forcing the Respondent to dispatch another driver with a replacement vehicle. Neiderhofer stated that this incident was a minor factor in Hewitt's discharge. However, he also testified that the decision to fire Hewitt was made by Director of Operations John Eagle, not himself.⁷

Neiderhofer testified further that after the replacement ambulance was returned to employee Lynne Dentino, she complained that trash and dirty linen had been left in it. Dentino, however, testified that Hewitt and Brady did not use her vehicle.

At about the same time Neiderhofer says he received complaints from a number of ambulance drivers that the oxygen cylinders in their vehicles had not been secured. He contends this was something that Hewitt was supposed to do on Sunday, July 21.

Very late in the evening of July 23, Hewitt and Brady were directed by the Respondent's dispatcher to take a patient from Summers Point, New Jersey, to Vineland, a 2-hour round trip. They finished this assignment between 1 and 2 a.m. on July 24. Hewitt dropped Brady off and told her he would turn in the paperwork that they needed to turn in for the Respondent's billing purposes. Hewitt drove the ambulance home. On the morning of July 24, Hewitt's wife drove the ambulance to work. The Respondent contends that it was a violation of company rules for Hewitt to take the ambulance home and that Hewitt's wife was not authorized to drive it. I credit the Respondent's testimony in this regard over that of Hewitt.

The next day Neiderhofer was informed by B. J. Anderson, the Respondent's vice president for operations, that there were no records for Hewitt and Brady's trip to Vineland the night before. Anderson told him that if employees could not fill out paperwork properly they should be terminated.

Neiderhofer called Jennifer Brady and she informed him that Hewitt had told her that he would turn in the records for the Vineland trip. Neiderhofer also tried to reach Hewitt without success. At about 2 p.m. on July 24, Neiderhofer

found the paperwork for the Vineland trip in Hewitt's ambulance. It did not accurately reflect the mileage or duration of the trip to Vineland.

Later in the day, Neiderhofer called John Eagle, the Respondent's director of operations. They discussed all of the above incidents and, according to Neiderhofer, Eagle directed him to terminate Hewitt's employment. Eagle testified that it was the failure to secure the oxygen bottles that caused him to order Hewitt's termination. He also stated that driving the ambulance home on July 24 would also have been grounds for immediate termination. However, in a September 9, 1996 memorandum, Eagle stated that Neiderhofer terminated Hewitt and that Neiderhofer's reports indicate that Hewitt was terminated for "numerous work rule violations." (G.C. Exh. 5; also see G.C. Exh. 8.)

Michael Hewitt contends that he laid the oxygen cylinders on the stretcher so that the ambulance crews could tell they were full. Hewitt contends that Neiderhofer tacitly approved of this procedure, after initially objecting to it. I am unable to credit this testimony in part because Hewitt's testimony at Transcript 78 and 109 appears to be internally inconsistent as to whether Neiderhofer objected to his laying the oxygen bottles on the stretchers.

F. Analysis

In order to prove that an employer violated Section 8(a)(1) and (3) in terminating an employee, the General Counsel must show that union activity has been a substantial factor in the employer's decision. Then the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in union or other protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

To establish discriminatory motivation the General Counsel generally must show union or other protected activity, employer knowledge of that activity, animus or hostility towards that activity, and a causally related adverse personnel action. Inferences of knowledge,⁸ animus,⁹ and discriminatory motivation¹⁰ may be drawn from circumstantial evidence rather than from direct evidence.

In the instant case it is uncontroverted that Michael Hewitt engaged in protected union activity. He signed a union authorization card, expressed his support for the Union, and solicited other employees to join the Union. It is also clear that the Respondent was aware of some of this union activity through David Neiderhofer, whom it admits was a supervisor within the meaning of the Act.

What is missing from this case is any evidence of animus toward Hewitt's union activity. Since I have not credited Hewitt's testimony with regard to Neiderhofer's admonition to "back-off" from the organizing campaign, there is no direct evidence of animus. Moreover, even if I had credited this testimony, there would be no such evidence. Hewitt testified that the statement was made in passing in a non-threatening tone of voice. Further there is no substantial evi-

⁷As described below, the Respondent's evidence is conflicting as to whether Hewitt was fired by Neiderhofer or Eagle.

⁸*Flowers Baking Co.*, 240 NLRB 870, 871 (1979).

⁹*Washington Nursing Home*, 321 NLRB 366, 375 (1996).

¹⁰*W. F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995).

dence rebutting Neiderhofer's contention that he was not opposed to the organizing drive and in fact was in favor of it.¹¹

There is also insufficient evidence of disparate treatment from which I can infer discrimination in Hewitt's termination. Other employees who were not disciplined for infractions similar to Hewitt's were also union supporters. For example, the Respondent would have more effectively discouraged its employees from joining the Union on July 24, if it had also discharged Brady, who it could have held responsible for most of the same transgressions as Hewitt. Thus, I can draw no inferences from the fact that Hewitt was terminated and Brady was not.

G. The Inconsistencies, Contradictions, and Shifting Explanations Given by the Respondent for Michael Hewitt's Discharge do not Establish that the Respondent's True Motive was a Violation of the Act

In *Precision Industries*, 320 NLRB 661 (1996), the Board observed that

[h]aving discredited the Respondent's explanations for its actions, the judge was entitled to infer that there was another reason, but it does not necessarily follow that the real reason was grounded in antiunion animus. Those explanations might have been offered in an attempt to conceal a violation of some other statute instead of the Act, or a motive that may have been base but not unlawful at all. Consequently we reject any suggestion that the "inconsistencies, contradictions, improbabilities and aberrational and shifting explanations" in the testimony of the Respondent's witnesses "necessarily compel" the conclusion that the Respondent's true motive in implementing those processes was discriminatory within the meaning of the Act. [Footnote omitted.]

There are a number of factors regarding Michael Hewitt's termination that are sufficient to make one suspicious as to the Respondent's motivation in discharging him. However, the failure of the General Counsel to otherwise prove antiunion discrimination renders these suspicions insufficient to infer a violation of the Act. Efficient had a progressive discipline policy and prior to his termination, Hewitt had never been disciplined. John Eagle's response is that failure to secure oxygen cylinders is grounds for immediate termination. However, the Respondent's evidence in this regard is far from overwhelming.

¹¹ I give no weight to Thomas Willett's testimony that Neiderhofer's name "came up in an anti-union sense in the last [1995] election [Tr. 208]." There is no identification of who attributed antiunion activity to Neiderhofer. Moreover, Willett's testimony if credited would only establish that Neiderhofer was opposed to the Union in 1995. One would have to show more to establish animus. Neiderhofer testified that the Respondent's failure to deliver on various promises to employees led him to actively support the Union in 1996.

Neiderhofer testified that, when he called Eagle, they discussed Hewitt's failure to secure oxygen cylinders in all the ambulances on Sunday, July 21. However, there is nothing in Neiderhofer's description of the conversation at Transcript 160 that indicates that he gave Eagle the impression that Hewitt was endangering other employees or patients. To the contrary, Neiderhofer's account suggests that he was annoyed, because Hewitt left work for others that he had plenty of time to do himself.

Eagle's testimony about this conversation is simply that when Neiderhofer got to the infractions about the oxygen bottles he decided to terminate Hewitt. First, the Respondent's evidence is conflicting as to whether Neiderhofer or Eagle fired Hewitt. Second, its evidence that it fired Hewitt, an employee with a perfect work record up until July 17, without warning, for being lazy on one Sunday, is not convincing. In this regard I deem it significant that Neiderhofer's account of his conversation with Eagle suggests that Eagle did not tell him that he was firing Hewitt for the latter's failure to secure the oxygen cylinders.

Additional skepticism as to the Respondent's motivation arises from Neiderhofer's testimony that before he talked to Eagle, Vice President B. J. Anderson suggested that Hewitt should be terminated for failing to fill out the paperwork properly for the Vineland trip. This also suggests that the failure to secure the oxygen bottles was not the real reason for his termination.

Finally, the Respondent orchestrated a letter writing campaign immediately following Michael Hewitt's termination to get fellow employees to state that they were unwilling to work with his wife. She was terminated on July 31, one week after her husband, allegedly for insubordination when she questioned Eagle about these letters. This may also be evidence of an ulterior motive for the discharges of Michael and Tara Hewitt.

In summary, the record suggests that there are other reasons than those stated by the Respondent for firing Michael Hewitt without prior warning. However, there is insufficient evidence to conclude that his union activity, which appears to have been quite unremarkable, was related to his discharge. There is insufficient evidence to infer knowledge of that activity on the part of any supervisor other than Neiderhofer, animus towards that activity and a link between his union activity and termination.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The complaint is dismissed.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.